LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 24 1967
JOHN F. DAVIS, CLERK

In The

# Supreme Court of the United States

October Term, 1966

No. 965

HOWARD S. KATZ and DAVID A. BAUMANN
(by Howard S. Katz as his next friend),

*Petitioners,*

v.

HONORABLE HAROLD R. TYLER, JR., Judge of the United States District Court for the Southern District of New York,

*Respondent.*

## PETITIONERS' REPLY BRIEF TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

HENRY MARK HOLZER
PHYLLIS TATE HOLZER
*Lawyers for Petitioners*
35 East 35th Street
New York City, 10016
(212) MU 5-4265

Martin Lutz Appellate Printers, Inc.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Statement ..... | 1 |
| The Ninth Amendment ..... | 2 |
| The Nuremberg Charter ..... | 5 |

*In The*

# Supreme Court of the United States

October Term, 1966

No. 965

HOWARD S. KATZ and DAVID A. BAUMANN
(by Howard S. Katz as his next friend),

*Petitioners,*

*v.*

HONORABLE HAROLD R. TYLER, JR.,
Judge of the United States District Court
for the Southern District of New York,

*Respondent.*

## PETITIONERS' REPLY BRIEF TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

### STATEMENT

To add to the confusion engendered by the Second Circuit's cryptic disposition of this case, we now have the government's opposition to the granting of this Petition which lays "to one side the questions whether petitioners had standing to sue and whether mandamus in the Court of Appeals was the proper remedy." After laying them to one side, unfortunately the government never returns to deal with them. It would thus appear

that the government has no desire to discuss two of the three questions raised by this Petition, questions which we have made clear are of tremendous import in the area of federal practice and procedure. Perhaps, by its unwillingness to discuss these questions, the government is conceding that as to them, certiorari should be granted. At the very least, it has conceded that it considers only the substantiality issue "entirely clear."

## THE NINTH AMENDMENT

The government also concedes that "no court has considered the validity of the Act under the Ninth Amendment." Once having done this, the government's only way out is to assert (not argue) that the Ninth Amendment "has no bearing on the Act."

An Amendment of the Constitution "has bearing" on a congressional Act if and to the extent that the right or rights protected by that Amendment are infringed upon by the Act. What does it mean to argue that the Ninth Amendment has no bearing on the Universal Military Training and Service Act? It means the government is contending that a man's right to life and liberty are not being infringed upon when he is forcibly taken from his home, his loved ones and his private pursuits, forcibly detained, forcibly disciplined, forcibly made to eat what is provided or starve, forcibly made to wear what he is given, forcibly trained as a killer, forcibly transported all over the country or overseas, forcibly put under fire, forcibly ordered to kill or be killed, and often forcibly required to become a martyr on the battlefield.

The government argues that because Congress has a delegated power to "raise and support armies," and because the Ninth Amendment reserves only unenumerated rights to the people, the reserved rights must yield to the delegated power. What is wrong with the government's argument is that conscription is not the delegated power — only the authority to raise armies is. And there is no conflict per se between that authority and the rights protected by the Ninth. The fact that conscription was once (and only once) upheld "as a valid exercise" of that authority (p. 3 of the government's brief) does not transform that exercise into a delegated power. And the government concedes that the validity of this "exercise," this method of implementation, has never been considered under the Ninth Amendment—until now.

What the government seems to be implying is: given a specific delegated power, Congress can do anything it likes, trample on any rights it chooses, to implement that power. If in "supporting" armies Congress passed a law infringing on free speech, the courts would not be denying the power to support armies by striking down that law as violative of the First Amendment. If in "establishing" post offices, Congress passed a law instituting forced labor, the courts would not be denying the post-office power by striking down that law as violative of the Ninth Amendment, or any other. What is the difference between such cases and the instant one?

Given a legitimate function of Congress, a proper delegated power, is there to be no limitation on how Congress conducts those functions and implements those powers? Given a valid

end, are nefarious means to be permitted and condoned? If the Ninth Amendment reserves fundamental rights — among them life and liberty — which were never delegated away, shall Congress be allowed to invade them indirectly, under the guise of "implementing" a delegated power? It is these profound questions — questions touching the vitals of our political structure — that, via the conscription issue, this Petition seeks to have the Court answer.

Heretofore, we have argued that the Act has only been challenged in this Court once before in the Selective Draft Law Cases of 1918. The government has agreed, except to the extent that it says United States v. Williams, 302; U.S. 46, also challenged the Act. However, Williams involved a claim for a deceased enlistee's insurance. A dictum that conscription was constitutionally permissible cited back to the Selective Draft Law Cases. This hardly justifies the government's characterization that this Court has "often" upheld conscription.

Heretofore, we have argued that the Act was never challenged by either the Ninth Amendment, or the Nuremberg Charter. To this, the government also agrees.

Therefore, in this case's challenge to conscription we have a brand new question — a question which affects so many Americans in such a serious personal way that further argument on the point is unnecessary.

If the government's opposition here has done anything, it has further demonstrated why this Petition should be granted.

## THE NUREMBERG CHARTER

The government has sought to swiftly dispose of petitioners' Nuremberg argument by simply observing that there are three kinds of war crimes, and that we have not tried to show that the United States is committing any of them, or that it has commanded any of its citizens to do so — thereby completely missing the whole point of our contention.

This attitude is a prime example of being "concrete bound" — of losing sight of the principle involved. It could be argued persuasively that it constitutes a "crime against humanity" for a country to force its male citizens to fight and die against their will — but this argument, too, would not reach the core of why conscription violates the Nuremberg Charter.

As we have shown, the principle here is that the mere existence of the Charter and the Draft together create a situation of "damned if you do, and damned if you don't" — a situation where a young American who "chooses" the Army over jail is impaled on the horns of a dilemma, not necessarily by what the Army is ordering him to do now, but by what he may be ordered to do at any time. He can not disobey any Army orders without going to jail or being shot; he is forced to act pursuant to the orders of superior officers, whatever those orders might be. And the Charter provides that if he does commit "war crimes," the fact that he was ordered to is no defense.

It is this issue that the government evades

when it argues that the Charter has no application to the conscription issue.

Many young Americans are today asking themselves whether to evade compulsory military service and go to jail, or to enter military service where, upon being given orders to do something wrong, either they disobey orders and go to jail or get shot, or do the act and perhaps later be told that the fact they acted under orders was no defense.

This Court must answer this question for these young men. It can no longer allow American youths to be "damned if they do, and damned if they don't."

Certiorari should be granted.

Respectfully submitted,

Henry Mark Holzer
Phyllis Tate Holzer
*Lawyers for Petitioners*

[2/67]